Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Nebraska Public Service	)	
Commission and Kansas Corporation	)	
Commission for Declaratory ruling or, in	)	
the Alternative, Adoption of Rules Allowing	)	**WC Docket No. 06-122**
State Universal Service Funds to Assess	)	
Charges on Nomadic Voice Over Internet	)	
Protocol Intrastate Revenues	)	

COMMENTS OF CENTURYLINK
ON PETITION FOR DECLARATORY RULING
OR RULEMAKING

INTRODUCTION

The Nebraska Public Service Commission and the Kansas Corporation Commission ("NPSC" and "KCC," respectively) have asked the Commission to issue a declaratory ruling that it has not preempted states from assessing universal service charges on the intrastate revenues of providers of "nomadic" interconnected voice over Internet protocol ("VoIP") services.[1] In granting the Petition, they also ask that the Commission declare that states have discretion to adopt any mechanisms that do not assess interstate revenues and that contain procedures designed to ensure that no provider pays assessments on the same intrastate revenues to more

[1] Public Notice, DA-09-1774 (rel. Aug. 10, 2009). Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues, WC Docket No. 06-122 (filed July 16, 2009) ("Petition"). Nomadic VoIP refers to any service by which a customer can make a voice call to the public switched telephone network by using an Internet connection, without being tied to a particular service address.

than one state.[2] If the Commission declines to issue the declaratory ruling, the Petition asks that the Commission act quickly to propose and adopt rules that make clear that states may assess universal service charges on the intrastate revenues of nomadic interconnected VoIP providers.[3]

CenturyLink supports the Petition. In light of the Eighth Circuit's ruling in *Vonage v. FCC*,[4] state commissions are facing the prospect of litigation over their efforts to collect universal service fund ("USF") contributions from nomadic VoIP providers on intrastate revenues.

I. A DECLARATORY RULING IS WARRANTED AND APPROPRIATE.

The NPSC and KCC filed the Petition as the logical step after the Eighth Circuit found the Commission's regulation of nomadic VoIP services precluded state regulation. [5] The NPSC had ordered nomadic VoIP service providers in its state, including Vonage, to contribute to the state universal service fund based on their intrastate revenues. Vonage, however, refused to collect the universal service surcharge. Instead, it went to court to challenge the NPSC's authority to require nomadic VoIP providers to provide any support to state universal service.

The district court granted Vonage's request for an injunction.[6] The court concluded that a state universal service contribution requirement would conflict with federal universal service assessments, because it read the Commission's Vonage preemption order to find it would be

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[2] *See* Petition at 3.

[3] *Id.* at 3-4.

[4] *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, 564 F.3d 900 (8th Cir. 2009).

[5] *See* Petition at 21-23.

[6] *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n*, 543 F. 2d Supp. 3d 1062 (D. Neb. 2008), *aff'd*, 564 F.3d 900 (8th Cir. 2008).

"impossible" to separate the interstate and intrastate components.[7] The NPSC appealed the district court's ruling.

At the Eighth Circuit, the Commission filed an amicus brief supporting the NPSC.[8] It acknowledged that nomadic VoIP obviously includes intrastate traffic. It explained that, contrary to Vonage's claims, "[t]he FCC has not preempted the NPSC USF order."[9] On the contrary, it advised the court, "[t]he NPSC's rule for determining the revenue base upon which the state's contribution requirements are assessed is also consistent with the FCC's contribution rules," and appropriately "mirrors" its methodology.[10]

The Eighth Circuit nevertheless upheld the district court's injunction, ruling that the district court had not unreasonably concluded that regulation of nomadic VoIP services was limited solely to the Commission.[11] It pointed out, in particular, that the NPSC utilized the customer's billing address as the proxy for determining whether a call is interstate or intrastate. But another state could adopt the customer's area code as the proxy, leading potentially to "duplicative charges." It concluded that "[t]his potential for conflict between state regulations

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[7] Vonage had argued that it would be impossible to separate nomadic VoIP service into distinct interstate and intrastate portions, and that federal jurisdiction was therefore exclusive. *See Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Pub. Utils. Comm'n,* 19 FCC Rcd 22404 (2004).

[8] Brief for Amici Curiae United States and Federal Communications Commission Supporting Appellants' Request for Reversal, *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, No. 08-1764 (8th Cir. Aug. 5, 2008).

[9] *Id.* at 13.

[10] *Id.* at 12, 16.

[11] *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n,* 564 F.3d 900, 905-06 (8th Cir. 2009).

militates in favor of finding preemption."[12]

The Commission can effectively remove this potential for conflict, by issuing an order declaring that states that adopt the inverse of the federal rule do not conflict with federal regulation of nomadic VoIP. Such a declaratory ruling need only restate the reasonable conclusions already outlined publicly in the Eighth Circuit brief. The ruling would allow state commissions to ensure that nomadic VoIP providers pay their share to support state universal service, while also ensuring that those providers are not subject to duplicative or conflicting assessments, either between federal and state jurisdictions or among different states. The ruling would avoid needless preemption litigation, and help bolster state universal service funds that are particularly stressed in heavily rural states like Nebraska and Kansas. Additionally, consistent with the *VoIP USF Contribution Order*, the ruling would promote competitive neutrality by helping ensure that one class of provider is not given an artificial, and ultimately unfair, regulatory advantage in the marketplace.

II. COMMISSION PRECEDENT DICTATES THAT NOMADIC VOIP PROVIDERS SHOULD ALSO SUPPORT STATE UNIVERSAL SERVICE.

The Commission has already made it plain that interconnected VoIP must contribute to support universal service.[13] Interconnected VoIP services are little different from more

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[12] 564 F.3d at 906. Two other courts followed the court to the same conclusion. *New Mexico Pub. Reg. Comm'n v. Vonage Holdings Corp.,* 2009 U.S. Dist. Lexis 74229 (D. N.M. July 28, 2009); *Vonage Am., Inc. v. City of Seattle*, 2009 Wash. App. Lexis 1632 (Wash. Ct. App July 6, 2009).

[13] *Universal Service Contribution Methodology*, 21 FCC Rcd 7518 at ¶ 34, 52 (2006) ("*VoIP USF Contribution Order*"), *aff'd in part, rev'd in part, Vonage Holdings Corp. v. FCC,* 489 F.3d 1232 (D.C. Cir. 2007).

traditional, circuit-switched services. They merely use Internet protocol technology to initiate a call. Consumers see these services -- and interconnected VoIP providers market these services -- as a "substitute for traditional phone service."[14] Unquestionably, interconnected VoIP providers "benefit from universal service," the Commission has found, "because much of the appeal of their services to consumers derives from their ability to place calls to and receive calls from the PSTN."[15]

The public interest, the Commission has emphasized, requires "competitively neutral" rules.[16] This was true when the Commission mandated equal support for universal service, and for disability support, and for E911 capabilities. It is essential that "disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers."[17] Requiring all interconnected VOIP providers to contribute to USF promotes competitive neutrality by reducing "the possibility that carriers with universal service obligations will compete directly with providers without such obligations."[18]

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[14] *VoIP USF Contribution Order* at ¶ 43.

[15] *Id.*

[16] In the context of universal service support, the Commission has said competitive neutrality means "neither unfairly advantag[ing] nor disadvantag[ing] particular service providers or … technologies" in the application of Commission rules. *Federal-State Joint Bd. on Universal Service,* Report and Order, 12 FCC Rcd 8776 at ¶ 47 (1997), *Errata*, FCC 97-157 (rel. June 4, 1997), *aff'd in part, rev'd in part and remanded in part sub nom. Texas Office of Pub. Util. Counsel v. FCC,* 183 F.3d 393 (5th Cir. 1999), *cert. denied,* 530 U.S. 1210 (2000), *cert. dismissed,* 531 U.S. 975 (2000) ("*Federal-State Joint Bd. Order*").

[17] *Federal-State Joint Bd. Order*, 12 FCC Rcd 8776 (1997) at ¶¶ 48, 49.

[18] *VoIP USF Contribution Order* at ¶ 44. The Commission need not decide, in this declaratory ruling, whether interconnected VoIP is a telecommunications service or an information service.

Under the current universal service regime, states play a very important role. State universal service funds are under serious and growing pressures, and they depend on contribution revenue. Ensuring that state commissions can assess universal service contributions on intrastate revenues of nomadic VoIP providers is entirely consistent with the public interest and with the Commission's established precedent. Failing to issue such a declaratory ruling would only undermine "the technology-neutral goals of the Act" and frustrate "Congress' aim to encourage competition."[19]

III. THE PETITION'S INTERSTATE ASSESSMENT OPTIONS ENSURE THAT STATE ASSESSMENTS DO NOT INCLUDE INTERSTATE REVENUE.

The Commission has already concluded, properly, that VoIP providers must contribute to support universal service. In the *VoIP USF Contribution Order*, the Commission directed interconnected VoIP providers to contribute to support universal service based on their interstate revenues.[20] The Commission recognized that interconnected VoIP providers, like more traditional voice telephony providers, carry interstate and intrastate calls. The Commission limited its universal service contribution assessments to interstate revenues, which are within its jurisdiction.

The Commission allowed interconnected VoIP providers three ways of determining the percentage of their revenues that are interstate.[21] As the first alternative, an interconnected VoIP provider can opt for a safe harbor, by which 64.9% of its revenues would be treated as interstate.

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[19] *Deployment of Wireline Servs. with Advanced Telecoms. Capability*, Order on Remand, 15 FCC Rcd 385 at ¶ 12 (2000).

[20] *VoIP USF Contribution Order* at ¶ 52.

[21] *Id.* at ¶¶ 53, 57.

As a second option, an interconnected VoIP provider can file a traffic study providing a suitably reliable estimate of the percentage of interstate traffic. As a third choice, an interconnected VoIP provider can report its interstate revenues based on actual revenue allocations. This approach has been expressly upheld.[22]

Quite reasonably, the Petition proposes that the FCC should confirm that a state may assess universal service on intrastate revenues using the inverse of those same three options for nomadic VoIP providers.[23] Where a provider chose the safe harbor assessment to determine its interstate revenues, it follows that 35.1 percent of its revenues can and should be deemed intrastate. Where a provider chose to file a traffic study for federal universal service contribution assessment, it follows that the same traffic study can and should be the basis for its intrastate assessment. And where a provider submits interstate traffic based on actual revenue allocations, it is reasonable to expect the same allocations should govern its intrastate traffic.

State authorities can reasonably apply these same three options for nomadic VoIP providers. The Commission has no reason not to endorse the same options at the state level that it has adopted at the federal level.

IV. A DECLARATORY RULING IS APPROPRIATE.

Through a declaratory ruling, the Commission can make clear that states have discretion to implement any reasonable system to assess intrastate universal service contributions against

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[22] *Vonage Holdings Corp.*, 489 F.3d at 1242-43 (noting also that, in measuring interstate versus intrastate traffic, "Perfection ... is not what the law requires").

[23] Petition at 28-29. *See also id.* at 1 (pointing out that "[t]he FCC has already interpreted the law this way" in the Eighth Circuit brief.)

nomadic VoIP providers. The state's system simply must strive to avoid assessing state universal service contributions against interstate revenues, and to avoid assessing intrastate revenues of another state.

As the Petition explains, that declaratory ruling is warranted because states that assess universal service contributions on intrastate revenues of nomadic VoIP providers otherwise will continue to be challenged by service providers, like Vonage, who contend they lack any authority to require them to support the state universal service fund from their intrastate revenues.[24] It is understandably galling to the NPSC and KCC, and to other state authorities, that one class of voice competitor can evade their responsibility to support universal service. The Eighth Circuit ruling, however, predictably has been cited to claim that this state authority is preempted everywhere, because it is ostensibly impossible to separate the service between interstate and intrastate, and that state regulation inevitably with federal regulatory goals.[25]

CenturyLink believes that is a false argument, but it is an argument that state commissions should not have to defend against. Preemption litigation -- with its needless costs and potentially inconsistent results -- can be readily avoided by a declaratory ruling. Through such a ruling, the Commission can make it clear that preemption is not warranted. The Commission can make clear that state authority to assess universal service on intrastate calling has never been intended to be preempted, provided the state's system of universal service assessment is not incompatible with the federal model.

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[24] Petition at 3, 29, 32.

[25] *Minnesota Pub. Util. Comm'n v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007).

V. A RULEMAKING SHOULD BE UNNECESSARY.

If the Commission declines to grant the requested declaratory ruling, the NPSC and KCC ask the Commission to commence a rulemaking.[26] The rulemaking would revise Commission rules to ensure that states are not frustrated in seeking universal service contributions for intrastate calls handled by nomadic VoIP providers.

The Commission certainly could initiate such a rulemaking, but it would create additional delay. Delay is harmful and unnecessary. State universal service funds are under real stress. Usage of interconnected VoIP services is increasingly rapidly; millions of consumers nationwide already use nomadic VoIP services. States need universal service contributions, and they need to spread the burden of universal service support broadly to be fair to all consumers. The competitive playing field needs to be leveled.

Delay obviously undermines each of these goals, and needlessly. A declaratory ruling is the appropriate step to resolve this issue. The Commission should strive to do so promptly.

CONCLUSION

NPSC and KCC have amply justified a declaratory ruling. The Commission should act to grant the Petition. It should confirm that, under the current universal service regime, states are not preempted from assessing universal service contributions on intrastate revenues for nomadic VoIP services, provided they do so in ways not inconsistent with the assessment of federal universal service contributions. The Commission should declare that states are not preempted

[26] Petition at 3, *citing* 47 C.F.R. § 1.401.

when they limit state universal service assessments to intrastate revenues using the inverse of the Commission's three options for nomadic VoIP providers.

Respectfully submitted,

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